No. 1444. 1897. 613

Office Supreme Court
FILED.
APR 26 1898
JAMES H. McKENNEY

Brief of Peck & Hanson for Pet

Filed April 26, 1898.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1897.

THE MERCANTILE TRUST COMPANY,
Complainant,
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY et al.,
Defendants.

In the matter of the Intervening Petitions of the Chicago, Milwaukee & St. Paul Railway Company, The Huntting Elevator Company and Jacob Rau.

Brief in Support of the Separate Petitions of the Chicago, Milwaukee & St. Paul Railway Company, The Huntting Elevator Company and Jacob Rau, for Writs of Certiorari, to the United States Circuit Court of Appeals for the Seventh Circuit.

GEO. R. PECK,
BURTON HANSON,
COUNSEL FOR PETITIONERS.

The Gunthorp-Warren Printing Company, 53 Dearborn St., Chicago.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1897.

THE MERCANTILE TRUST COMPANY,
Complainant,
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY ET AL.,
Defendants.

In the matter of the Intervening Petitions of the Chicago, Milwaukee & St. Paul Railway Company, The Huntting Elevator Company and Jacob Rau.

Brief in Support of the separate Petitions of the Chicago, Milwaukee & St. Paul Railway Company, The Huntting Elevator Company and Jacob Rau, for Writs of Certiorari, requiring the United States Circuit Court of Appeals for the Seventh Circuit to certify to the Supreme Court for its review and determination the cases of

C. H. BOSWORTH, RECEIVER, ET AL.,
Appellants,
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
Appellee.

C. H. BOSWORTH, RECEIVER, ET AL.,
Appellants,
vs.
THE HUNTTING ELEVATOR COMPANY,
Appellee.

C. H. BOSWORTH, RECEIVER, ET AL.,
Appellants,
vs.
JACOB RAU,
Appellee.

STATEMENT OF FACTS.

The case presented by the record and the petition for writs of certiorari is this: One Bosworth, as Receiver,

operated the Chicago, Peoria and St. Louis Railway Company, which had a line of railroad from Peoria to East St. Louis, both in the State of Illinois. Having no terminal facilities whatever of his own at the latter place, the Receiver entered into a contract with the Terminal Railroad Association of St. Louis, whereby that Association undertook and agreed to furnish him necessary yard room, track facilities, switch engines and crews for handling his business, making and breaking up his trains that arrived at and departed from that place, *and storage room for a reasonable number of cars, not exceeding 150 at any one time.* Under this agreement, so much of tracks numbered from 40 to 50 as was necessary to give the Receiver storage room for that number of cars was, quoting from the second subdivision of the contract, "set aside for the use of the party of the second part," the Receiver. (Rau Rec., 111.) And these were the tracks that were commonly and usually used by the Receiver for handling and storing his cars and upon which they were placed upon their arrival at East St. Louis, and where they remained standing until they were delivered to the Terminal Association, or other disposition had been made of them. (Rau Rec., 76, 78, 81, 82, 95, 101, 181, 202, 229, 232; and Stipulation 2d Subdiv. Rau Rec., 115.) The practice under this agreement was that upon the arrival at East St. Louis of the Receiver's trains, they would come to a stop at the end of his track and there they would stand until a switch engine of the Terminal Association would hitch to them and switch them to some one or more of the ten tracks which the Receiver had the use of under his agreement with that association. After having been switched to these tracks, the cars would remain there until the Receiver gave directions to

the Terminal Association for their further shipment or transportation. If they were destined to St. Louis or to points beyond by way of the Terminal Association, the Receiver would make out a manifest, called a way-bill, which contained on its face the name of the consignor and consignee, the route and destination and number, name and contents of the cars, and deliver that to the agent of the Terminal Association and take his receipt therefor. Thereupon the switching crew of the Terminal Association would take the way-bill, take the cars named therein out of the Receiver's portion of the yard and place them in its portion of the yard, put them into a train and take them to the connection or destination indicated by the way-bill. If the cars were routed by some other line than that of the Terminal Association, such as the Wiggins Ferry, a competing line, they would be switched by the Terminal Association from the tracks which the Receiver used under his agreement with that Association, to the tracks of the ferry company. This service was performed under the agreement with the Terminal Association. (See 4th subdivision thereof, Rau Rec., 11.) The manner in which the Receiver's cars were handled after their arrival at East St. Louis is probably best told by the witnesses themselves. They are George H. Felps, agent of the Terminal Association, W. H. Calvert, agent of the Receiver, E. R. Stapleton, his chief clerk, and the Receiver himself.

Geo. H. Felps testified as follows:

Q. What company breaks up this train and places the cars on the tracks marked red?

A. The Terminal Railroad Association.

Q. That done under the agreement introduced here?

A. Yes sir; at a certain sum per car.

Q. What sum?

A. Fifty cents a car.

Q. When that train is broken up, as you have stated, and the cars set on the tracks marked red, what is then done with these cars?

A. We are done with the cars then until we get way-bills from the agent of the C. P. & St. L.

Q. From the receiver?

A. Yes, sir; from the agent of the receiver.

Q. What is a way-bill?

A. A manifest showing what disposition is to be made of the freight.

Q. When you receive the way-bill of a car what do you do then?

A. Card that car out, and our yardmen are instructed to switch it out and deliver it according to the instructions.

Q. Does the way-bill contain the number of the car and destination?

A. Yes, sir; consignee, destination and route.

Q. *When you receive this way-bill and switch the car out, where do you take it?*

A. *Take the car out of their yard, their portion of the yard, and place it in the train in our portion of the yard, and take it to the connection or destination indicated.* (Rau Rec., 82.)

And further at page 86 he testified:

Q. What was the custom in respect to handling these cars set out on these tracks, after they had been set there on the part of the Terminal Association?

A. *We had nothing to do with them at all until we received way-bills, if they stood there till doomsday.*

E. R. Stapleton, witness for Receiver, testified as follows:

Direct Examination.

Q. A train comes in on this "Y," what is then done with it by the receiver, if anything?

A. The trains stops on the "Y" and the receiver is done with them.

Q. Is that true?

A. Yes, sir; the receiver does not handle the cars or control their handling in a *direct* way after that. (Rau Rec., 199.)

Cross-Examination.

Q. The major asked if the receiver was done with them, so far as handling the cars?

A. So far as the handling of the cars.

Q. *The receiver did have something else to do with them with reference to sending them on to St. Louis in the way of giving way-bills?*

A. *Yes, sir; giving way-bills.*

Q. When those way-bills are made out by the agent at East St. Louis they are delivered to the Terminal Association?

A. And their receipt taken.

Q. Of the way-bill?

A. Yes, sir.

Q. So you would have the receipt of every way-bill delivered?

A. Yes, sir.

Q. Then the Terminal Association would take these cars according to the direction on the way-bill?

A. Yes, sir. (Rau Rec., 203, 204.)

W. H. Calvert, a witness for Receiver, testified as follows:

Q. When way-bills were made out by the receiver at East St. Louis for barley consigned to St. Louis and other points to which the Terminal Association was to take it, where were the way-bills made out—at your office?

A. Yes, sir.

Q. That would be way-bills of all cars going to some other points than East St. Louis?

A. Yes, sir; except such as were to go to Wiggins Ferry, in which case the way-bills would be delivered to the Wiggins Ferry.

Q. None of the cars in controversy here—barley—went by the way of Wiggins Ferry?

A. No, sir. (Rau Rec., 255.)

C. H. Bosworth, the receiver, testified as follows:

Q. Isn't it a universal custom whenever there is a car delivered from one company to another, consigned to a point beyond, before that car is taken by the company to which it is delivered and moved on to its destination a way-bill accompanies that car and is delivered to the receiving company?

A. I can't say it is a universal custom.

Q. How would the receiving company know what to do with a car without a way-bill?

A. Might take the directions of the agent; *I will state it is undoubtedly generally the case.* (Rau Rec., 247.)

And on page 248 the Receiver testified that until the Terminal Association received a way-bill it would not undertake to move a car, and that until a way-bill was delivered or instructions given to the agent of the Terminal Association the car was subject to his, the Receiver's orders.

The cars of barley in controversy came into the possession of the Receiver at Peoria from a connecting line of road. Their destination was St. Louis, Missouri. They were hauled by the Receiver to the end of his main track at East St. Louis. Upon their arrival there they were switched from such main track by a switch engine of the Terminal Association and placed upon some one or more of the ten tracks which the Receiver had the use of in the yards of that Association under the aforesaid agreement. There they remained standing until they were destroyed by fire, which occurred on the evening of the 28th day of October, 1894. *No way-bill had been delivered by the Receiver to the Terminal Association for any of the cars in controversy.* The petitioners base their right to recover on the ground that the cars and the barley they contained at the time they were destroyed by fire were in the possession of the Receiver and that he negligently

allowed them to stand or to be stored on tracks near by a long wooden warehouse that was filled with loose hay, through and into which locomotivs engines were continually passing and repassing, which warehouse taking fire was itself consumed along with said cars and their contents. The Receiver denies that the cars were in his possession at the time they were destroyed by fire, and alleges that before the fire occurred he had delivered them and their contents to the next connecting carrier, the Terminal Association, and that they were in the possession of that Association at the time of the fire, and that that Association negligently placed them alongside said wooden warehouse, which he characterizes as "a veritable fire-trap." The pleadings, therefore, raise a single issue: Were the cars and their contents at the time they were destroyed in the possession of the Receiver, or had they been delivered by him to the next succeeding carrier, the Terminal Association? The Master to whom the cases were referred, District Judge Allen, who presided at the Circuit, and Circuit Judge Jenkins, held that there had been no delivery of the cars by the Receiver to the Terminal Association and that he was liable for the value of the cars and their contents, while Circuit Judges Woods and Showalter held that there had been a delivery of the cars by the Receiver to the Terminal Association, but each disagreed with the other as to the reasons therefor.

ARGUMENT.

I.

Circuit Judge Showalter, in his opinion, holds that the act of the Terminal Association, in switching the cars from the Receiver's main track to the tracks which he used under his agreement with that Association, constituted a delivery of the cars by the Receiver to the Terminal Association, and that a delivery of the customary way-bill was not necessary to a delivery of the cars. This holding, we submit, is not only utterly opposed to the custom under which deliveries of cars were made by the Receiver to the Terminal Association at East St. Louis, as disclosed by the undisputed testimony, but is in conflict with the decisions of this and other courts.

There is no dispute in the testimony as to the custom under which deliveries of cars were made at East St. Louis by the Receiver to the Terminal Association. This custom was that a car was never treated as delivered until a way-bill therefor was passed to the Terminal Association. It is apparent to anyone who is at all familiar with the transportation business of the country that this must, in the very nature of things, be the custom and practice, for it can readily be seen what confusion and delay would arise in the interchange of traffic in car-loads between the various railway companies if each company should, upon the arrival of cars at the terminus of its line of road, or at such other place where delivery is made to the next succeeding carrier, claim that it had made a delivery by merely placing or causing cars to be placed upon certain tracks without notifying such succeeding carrier, either

by way-bill or otherwise, of the delivery, or giving any instructions or directions for their further transportation. It is clearly apparent that without such a way-bill, or something that is its equivalent, the succeeding carrier would not know what disposition to make of the car. It would not know its contents, its route or destination or the party to whom it should be delivered, neither would it have any data upon which it could make a charge for transporting it. All this information is withheld by the preceding carrier, in this case the Receiver, until the customary way-bill is delivered, and so long as it is withheld from the succeeding carrier, there cannot, in the very nature of the transaction, be a delivery of the property to which such information applies. It is to the interest of both shippers and carriers, as well as to the general commerce of the country, that there should exist no doubt as to what constitutes a delivery of property in course of transportation, as between connecting carriers.

That cars were never treated as delivered to the Terminal Association until the Receiver had delivered way-bills therefor, is clearly shown by another circumstance which the undisputed testimony discloses, which is that whenever the Receiver delivered cars to that Association, if such cars belonged to some other company, his car accountant immediately on the very day of the delivery of way bills therefor, and not until then, reported to the company owning the cars the fact that certain of its cars, giving their numbers, had on that day been delivered by the receiver to the Terminal Association. This was the practice at East St. Louis as well as at all junction points. (Rau Rec. 88, 89, 90, 98, 106, 153, 154, 155, 247.) These reports are called junction reports, and by means of them each railway company is advised of the where-

abouts of its cars when they are out of its possession. Mr. Beecham, car accountant of the Chicago, Milwaukee and St. Paul Railway Company, and Mr. Bradley, the Receiver's car accountant, both testified that the Receiver had not reported any of the cars in controversy as having been delivered to the Terminal Association. (Rau Rec., 99, 106, 154, 155. This was because no way-bill had been delivered by the Receiver to the Terminal Association of any of the cars of barley in controversy. And in this connection, the attention of the court is called to the significant fact that prior to and up to the time of the fire, whenever the Receiver delivered a way-bill to the Terminal Association, at the same time such way-bill was delivered, he caused to be sent by his car accountant to the car accountant of the company whose cars were delivered, by such way-bill, a report called a junction report, advising that company of the delivery of the car named in such way-bill to the Terminal Association, and not until a way-bill had been delivered for such car was that car reported delivered to that Association. So that a junction report and a way-bill went hand in hand with every car that was delivered by the Receiver to the Terminal Association. For example: Mr. Felps, the agent of the Terminal Association, testified (Rau Rec., 86, 87) that on the 28th day of October, the day of the fire, the Receiver delivered three cars of the Chicago, Milwaukee and St. Paul Railway Company, Nos. 2,100, 31,872 and 16,562, to the Terminal Association by delivering way-bills therefor. By referring to the testimony of Mr. Beecham (Rau Rec., 100, 101, and Exhibit "E." Rau Rec., 128, 129), it will be seen that on the very day the way-bills for these three cars were delivered to the Terminal Association, the Re-

ceiver's car accountant reported these three cars as having been delivered on that day to the Terminal Association.

Now what does Mr. Felps say he did immediately upon the receipt of the way-bills for these three cars?

Q. What did you do after receiving these way-bills with respect to those cars?

A. Cars carded out as usual to their proper connections or destinations.

Q. Following the directions of the way-bills?

A. Yes, sir; in accordance with the instructions.

Q. Was the service rendered by the Terminal Association, in breaking up of the train of the receiver when it came in on the "Y," and placing the cars on these tracks marked red, a separate and distinct service from the work you did after receiving the way-bills?

A. It was a separate and distinct service.

Q. Explain how and why?

A. We received for this service, taking care of the cars for which we had way-bills, a separate revenue.

Q. Separate from what?

A. From making and breaking up trains. (Rec., 87.)

By an examination of the testimony it will be seen that in every instance the Receiver did not report a car as having been delivered to the Terminal Association until he had delivered a way-bill therefor to that Association.

This custom is in accord with the views of text writers and the decisions of the courts. Ray, on Freight Carriers, 388, says:

"The placing of a car by an initial carrier on the side track of a connecting carrier, without giving the latter any notice and without marking it with the name and address of the consignee, *or sending any way-bill or shipping directions*, does not establish the relation of common carrier between the initial and the connecting carrier.

The following cases hold the same rule:

Tex. & Pac. Ry. Co. v. *Clayton*, U. S. C. C. A., 2nd Cir., 51 U. S. App., 676; s. c. 84 Fed. Rep., 305.

Mt. Vernon Car Co. v. *Ala. G. S. Ry. Co.*, 92 Ala., 296.

Ins. Co. v. *Ry. Co.*, 55 Tenn. Repts., 268.

Palmer v. *Pa. Co.*, Conn. Sup. Ct., 13 Atl. Rep., 818.

In *Mt. Vernon Car Co.* v. *Ala. G. S. Ry. Co.*, *supra*, the court say:

"The same rule is applicable in the case of connecting carriers; the responsibility peculiar to the common carrier is not devolved on the next connecting carrier until the receiving carrier has delivered the goods to the former with directions for their shipment, the place of destination and to whom consigned. *Until this is done the relation of common carrier is not established between the shipper and the connecting carrier.*"

In *Texas & Pacific Ry. Co.* v. *Clayton*, *supra*, the question of delivery between connecting carriers was discussed by Circuit Judge WALLACE. He says:

"It may be safely affirmed, as a proposition applicable to all cases, that a deposit of the goods with notice, express or implied, at any place where the second carrier has control of them, conformable with usage created by the course of business between the two carriers, is a sufficient delivery, and discharges the first carrier. The liability of the second carrier begins when that of the first ends. * * * In the present case the cotton had never been placed within the control of the steamship line of the defendant. * * * Before the steamship line could have identified it for the purpose of removal, and after that, before they could have exercised any control over it, the co-operation and assistance of the defendant were necessary."

So here the Receiver up to the time the cars of barley were destroyed had full control over their further movement. For without the information which would be conveyed by the delivery of the customary way-bill, the Terminal Association could not identify them for further transportation, neither could it transport them, as it had no knowledge concerning their contents, their route, destination or consignee. This information was all with the Receiver, and until he imparted it to the Terminal Association by the delivery of the customary way-bill, that Association could exercise no control over the cars in the way of their further transportation.

These decisions are all in harmony with the rule of this court announced in *Pratt* v. *Grand Trunk Ry. Co.*, 95 U. S., 43, cited by Circuit Judge Jenkins in his dissenting opinion. In this case the freight in controversy was *package* freight. Something more is required in making a delivery of a car loaded with merchandise from one carrier to another, than is required in making a delivery of package freight. The package is addressed and the receiving company can readily ascertain from the package itself the consignee and destination, but a freight car has no marks nor address upon it showing the consignee, route or destination. This information is only found in the way-bill, and until that is delivered there can not in the very nature of things be a delivery of the car.

The Terminal Association in switching the Receiver's cars from his main track and placing them upon the tracks which he had the use of under his agreement, did not thereby take possession of such cars or accept delivery of them as a carrier. Whatever possession it thereby had of the cars was under its agreement to furnish the Receiver the use of certain tracks in its yards for *his* cars,

and to switch *his* cars from his main line to certain other of *his* tracks. As between the petitioners and the Receiver, these tracks were his tracks and the switch engines his engines, as much so as if he had owned them outright. And the cars and the freight they contain while on these tracks were the Receiver's so far as handling and caring for them. The preamble of the agreement makes this plain:

"That, whereas, the party of the first part undertakes to give to the party of the second part (the receiver) terminal facilities at East St. Louis for the handling of *its* (his) trains, care of *its* (his) engines and cars, and the handling and care of *its* (his) freight, under the following terms and conditions:"

While this agreement did not exclude the relation of connecting carriers as between the Receiver and the Terminal Association, neither did it change their relation. The same acts were required of the Receiver in making a delivery of cars to the Terminal Association as would have been required had there been no contract relations between the two and the Receiver had owned the necessary terminal facilities at East St. Louis. In treating the question as to what constitutes a delivery as between the Receiver and the Terminal Association, the agreement by which the Receiver acquired the use of certain terminal facilities at that point should be wholly eliminated and the case treated precisely as it would be treated if the Receiver owned the terminal facilities which he used under his agreement with that Association. Carriers cannot shift responsibilities by contracting with others to perform the duty incumbent upon them. (*R. R. Co.* v. *Reich*, 32 S. W. Rep., 818.) It must, therefore, be regarded as a fact that the terminals which the Receiver used at East St. Louis were for all purposes, as

between him and the petitioners, his terminals, and that the tracks, engines and the men employed about them in the handling of cars brought there by his trains were all his. So that when his trains arrived at East St. Louis, were broken up, and the cars placed on certain tracks which he had the use of, under his agreement as between him and the petitioners, the engines and the cars doing this work were his, and the tracks upon which the cars were left standing until they were way-billed out were likewise his tracks. The case, therefore, stands as if the Receiver had, in fact, owned the terminals which he, in fact, used, and the trains had been broken up by his own switch engine and switching crew and the cars placed upon his own tracks. Had the Receiver owned the facilities which he had the use of and, in fact, did use under his agreement with the Terminal Association, no one would for a moment contend that the breaking up of his trains and placing the cars upon the tracks where they stood at the time of the fire constituted a delivery of them to the Terminal Association. And yet there is as much warrant for such a contention as there is to justify the claim which is now put forth, that he had delivered these cars and their contents to that Association by simply having them switched from his main track to other of his tracks which he used in handling his business at East St. Louis. Up to the time that the Terminal Association took possession of cars under way-bills which had been delivered to it, it did nothing with them that the Receiver would not have done had these terminal facilities been his own. The Terminal Association therefore acted merely as the servant or agent of the Receiver in breaking up his trains and placing his cars on certain tracks, for which it received from the Receiver fifty cents a car. *One rail-*

way company does not pay to another railway company fifty cents a car for the privilege of delivering cars to it. And the fact that the Receiver under his agreement paid the Terminal Association fifty cents a car for breaking up his trains and placing them on these tracks, shows conclusively that in doing this work it was not expected nor intended by either of the parties that a delivery was thereby made of the cars so handled to the Terminal Association.

It was stipulated between the parties that the cars of barley in controversy at the time they were destroyed by fire were standing on the tracks that were commonly used by the Receiver under his agreement with the Terminal Association. (Rau Rec., 115.) This fact in connection with the undisputed testimony in the case, that no way-bill had been delivered for any of the cars to the Terminal Association, and that the Receiver had not reported the delivery of any of the cars to the Chicago, Milwaueee and St. Paul Railway Company, the company owning them, proves conclusively that the cars at the time of the fire had not yet been delivered to the Terminal Association and fully sustains the position of Circuit Judge Jenkins in his dissenting opinion.

II.

Circuit Judge Wood bases his conclusion that there had been a delivery of the cars and their contents to the Terminal Association wholly upon the statement of counsel for the Receiver made at the conclusion of the hearing before the master (Rau Rec., 260), that he expected certain of the consignees to have been present and expected to prove by them that the Terminal Association

had an arrangement with them by which it agreed to hold cars of barley on "*their tracks*" (meaning the tracks of the Terminal Association) at East St. Louis, and give them other facilities in "*their yards*" at that place, and the consent of counsel for petitioners that the witnesses, if present, would testify substantially as counsel expected they would testify.

We feel that a wrong construction has not only been given to this statement, but an importance attached to it which is not warranted by facts which are indisputably proven, and which we believe should be all-controlling in this case.

In considering the question of the delivery of freight as between connecting carriers when the same is in course of transportation, the rule that when possession is once proven to be in certain one of several carriers, the presumption is that such possession continues in that carrier until it is proven to be elsewhere, and that the burden is upon that carrier to show delivery, should not be lost sight of. And this burden is not met by offering proof that is conflicting or uncertain in its character or meaning, or proof that is susceptible of different constructions, theories and inferences. *The proof must be certain and convincing, and, taken as a whole, consistent with no other theory than that of delivery. This is the rule.* And it should be adhered to strictly in view of the other rule of the federal courts, which is not the rule in most of the state courts, that the carrier in whose possession property is at the time of loss is alone responsible, and not the initial carrier, unless it is shown by clear and satisfactory proof that such carrier contracted for liability beyond its line; and such liability is never inferred from proof that is uncertain or doubtful.

Myrick v. *R. R. Co.*, 107 U. S., 102.

The difficulties which beset shippers over several connecting lines of carriers, in case their property is lost, unless the rule that the carrier in whose possession the property is once shown to be shall show delivery by proof that is certain, clear and satisfactory, is strictly enforced, is well illustrated in the case at bar. After a litigation lasting three years, the claimants are now advised by a divided court, each judge differing with the other, that they have been pursuing the wrong carrier. They have no contract with the initial carrier for a through liability; they made the best investigation they could, and after tracing the property into the possession of the Receiver, and being informed that the Receiver's agent at East St. Louis, under the direction of the Receiver, in making proofs of loss to the insurance companies concerning the destruction of the property involved in this litigation, stated under oath that the cars in question were standing on tracks that were used by the Receiver (Rau Rec., 176); that no way-bill had ever been delierved by the Receiver to that Association of any of the cars, although it was an invariable custom to do so whenever a delivery was made; that the notices and directions in reference to the handling of the barley after it had reached East St. Louis, and while it was standing on these tracks, all passed between the consignees and the Receiver, they naturally concluded that the Receiver had the possession of their barley at the time it was lost, and accordingly intervened, as they were solicited by the Receiver to do, in the foreclosure suit.

Returning to the proposition that possession of this property having been proven to be in the Receiver, the burden was upon him to show by proof that was clear and satisfactory that he had delivered it to the Terminal

Association, let us briefly recur to what the testimony indisputably shows;

1. The Receiver had no terminal facilities at East St. Lous. He therefore contracted with the Terminal Association for the necessary yard room and track facilities and switch engines and crews for the handling of his cars, making and breaking up his trains that arrived at and departed from that place, *and for storage room for a reasonable number of cars not exceeding one hundred and fifty at any one time.* Under this agreement so much of tracks numbered from forty to fifty as was necessary to give the Receiver storage room for 150 cars was, quoting from the second subdivision of the contract, "set aside for the use of the party of the second part"—the Receiver. And these were the tracks that were commonly and usually used by the Receiver for handling and storing his cars, and upon which they stood until they were delivered to the Terminal Association by the switch engine of that Association taking them off these tracks and placing them in its portion of the yard. (Testimony of Roeder, Rau Rec., 76, 78; Felps, 81, 82, 95, 101; Lester, 188; Stapleton, 202; Calvert, 229, 232.) To identify these tracks they were marked red on a plat introduced in evidence. All the cars in controversy were at the time of the fire standing on some one or more of these tracks. (Rau Rec., 83, 84, 85.) *And it was stipulated by a written stipulation, signed by Receiver's counsel, that the cars in controversy at the time they were destroyed by fire were standing on the tracks that were commonly used by the Receiver under his agreement with the Terminal Association.* (Rau Rec., 115.) They were, therefore, in the Receiver's possession. The stipulation concedes this. They were placed there and were standing there in pur-

suance of the aforesaid agreement between the Receiver and the Terminal Association. The Receiver had the same right to have them switched there and stored there as though the tracks were his and the engine which placed them there was his, for he contracted and paid for this right, and so long as he occupied no more than the allotted room—150 cars—he could have stored these cars there until the right to do so ceased with the expiration of the contract. At the time of the fire there were, all told, but seventy of the Receiver's cars on these tracks. (Rau Rec., 177, 180.) So that the Receiver had room to spare. Now, how can it be reasonably urged that these cars were not as much in the physical possession of the Receiver as they would have been had he owned the tracks outright on which they stood and the engine which switched them there?

If they were, then it necessarily follows that the Terminal Association was not holding them at the time of the fire, and therefore the arrangement which counsel proposed to prove by certain absent witnesses, that it had agreed with the consignees to hold their cars on its ("*their*) tracks" and give them other facilities in its ("*their*) yards" had not yet become effective, for the cars were not in "*their yards*" or on "*their tracks*," but were on the tracks of the Receiver.

Let us recur to the statement which counsel made: It was that he *expected* to prove by certain witnesses that the Terminal Association had agreed to hold cars on "*their tracks*" at East St. Louis and offered other facilities in and about "*their yards*" at that place. Appellees' counsel admitted that if the witnesses were present they would testify substantially as counsel stated he *expected* they would testify. (Rau Rec., 261–262.) We at

that time had no thought, and not until it was argued in opposing counsel's brief on these appeals did it ever occur to us, that it could or would be contended that this informal stipulation, made in the hurry of and for the purpose of expediting a hearing, would or could be construed in such a manner as to cover cars *while they were yet standing and being held on tracks used by the Receiver, under his agreement with that Association*, and when they had not been way-billed to that Association. Especially when the Receiver's agent had, before this statement of counsel had been made, testified positively, and at the instance of counsel for Receiver, that these cars were held by the Receiver on these tracks on orders placed with him by the consignees to hold their barley. We supposed, and we submit any counsel would reasonably have supposed under like circumstances, that this statement of counsel related only to cars after they had been delivered by the Receiver to the Terminal Association in the usual and customary way in which deliveries were made at that place, so that it could be said that the cars were standing on "*their tracks*" in "*their yards.*" We did not suppose that it would or could be construed to apply to cars while they were standing on tracks which the Receiver was using under his agreement with that Association, made for no other purpose than to give him track and yard room for handling and storing *his* cars, or to cars while they were being held on such tracks on orders placed with the Receiver's agent by the consignees to hold their barley. (Rau Rec., 205.)

The holding of Circuit Judge Woods that the supposed arrangement between the consignees and the Terminal Association had become effective as to the cars of barley

in controversy, notwithstanding there had been no delivery of them by the Receiver to the Terminal Association and notwithstanding the Receiver still had the control and direction of them, and notwithstanding the Terminal Association had not up to the time they were destroyed knowledge of consignees, route, destination or contents of the cars, is, we submit, completely and conclusively answered by Circuit Judge Jenkins in his opinion. We quote from that opinion:

"It is held by the presiding judge that by reason of a certain supposed agreement between consignees in St. Louis and the Terminal Association—to the effect that the latter, as an inducement to barley dealers to ship over its lines, would hold cars containing shipments to such consignees on the tracks of the Terminal Association at East St. Louis—the receiver was absolved and liability under such agreement imposed upon the Terminal Association so soon as these cars had under the contract with the receiver been placed upon the tracks designated for the accommodation of the receiver's cars. I am unable to concur in this conclusion. I have sought to show that there had been no delivery of these cars to the Terminal Association. It had not knowledge of their destination. It had not knowledge of the consignees of them. They were subject to the direction and control of the receiver. The Terminal Association under its contract with the receiver had placed these cars upon these tracks for the receiver and for a compensation agreed upon. It therein was the agent of the receiver. It could not know whether these cars were to be transported over its line or the lines of the Wiggins Ferry Company; it could not know in what direction they were to be transported or their ultimate destination. When it had placed the cars on these tracks pursuant to its contract with the receiver it had nothing further to do with them until the receiver had dispossessed himself of possession and control and had invested the Terminal Association therewith. I cannot comprehend that the general agreement between the Terminal Association and consignees can become operative with respect to the contents of these cars until

delivery to the Terminal Association and it had been invested with the exclusive possession and the exclusive control of them. The force of the reasoning is not perceived whereby it is held that because in fact these goods were ultimately to go to persons who had contracted with the Terminal Association—of which contract the receiver had no knowledge—therefore these goods were held under that contract before delivery in fact to the Terminal Association and before it was invested with exclusive control of them. I do not undertake to say that the Terminal Association may not be liable to the receiver for its negligent acts causing the fire whereby this property was destroyed. Neither the question nor the party is before us. The question here is, whether the receiver is absolved from liability; whether, failing a delivery of the cars to the Terminal Association, failing a surrender by the receiver of control over them, with ignorance upon the part of the Terminal Association of their destination or their consignees, the agreement between the Terminal Association and the consignee had become operative with respect to these goods. I think not. If the receiver had directed that the Terminal Association under its contract with him should transfer these goods to the Wiggins Ferry Company, his order must have received recognition and have been carried out by the Terminal Association; and it cannot be doubted that up to the time of the fire in question the goods were so subject to the receiver's direction and control. For these reasons I think that the decrees appealed from should be affirmed."

2. That cars containing barley, after they were placed on these tracks and up to the time the Receiver had delivered to the Terminal Association the customary waybills for them, and that Association had taken them off these tracks and placed them in its portion of the yard, as testified by Felps (Rau Rec., 82), they were held by the Receiver under an arrangement between him and the consignees, and not between them and the Terminal Association, there is no doubt under the testimony. For the Receiver's chief clerk, Stapleton, who was in charge of this

business at East St. Louis under Calvert, the agent, testified, in response to questions asked of him by the Receiver's counsel, that after cars loaded with barley had been placed upon these tracks he would take the way-bills which came with the cars and notify the consignees that "*we*"—meaning the Receiver, not the Terminal Association—had a car, number so and so, loaded with barley, "Where do you want it?" and at such time as he—the consignee—got ready he would send the notice back, not to the Terminal Association, but to the Receiver's agent, to send the car to Hines' brewery, or Hiland or some other point. Thereupon he, Stapleton, would make out a new way-bill for the car, deliver it to Felps, the agent of the Terminal Association, and take his receipt. Now, why was this transaction? The following question and answer will explain:

Q. Was that a different and separate transaction, having reference to the original contract between the shipper and the Chicago, Milwaukee and St. Paul; *was it a new arrangement the consignee directed and controlled, or was it the original arrangement named by the shipper?*

A. *A new arrangement by the consignee, who placed orders with us to hold his barley.* (Stapleton's testimony, Rau Rec., 205.)

To the same effect is Calvert's testimony, Rau Rec., 235, 236, and Bosworth, Receiver, 248. Now, if it is to be presumed, as it is by the opinion of the presiding Judge, that Stapleton sent to the consignee notices that the cars containing the barley in question had arrived, and asked them where they wanted them sent, then it must also be presumed that such notices were sent in pursuance with the arrangement which Stapleton says the consignee had with him to hold their barley until further orders. If this is true, then it also follows that this par-

ticular barley was not held by the Terminal Association under any arrangement which it had with the consignee to hold barley, but was held by the Receiver under the arrangement which the consignee had with him to hold their barley.

That this correctly states the case there can be no doubt, for it fully consists with the conduct of the parties in reference to this barley while it was standing on these tracks before way-bills had been delivered therefor. For up to that time all transactions concerning it were had by the consignees with the Receiver; they treated the barley as in the Receiver's possession, and the Receiver regarded himself as having possession of it. The Receiver himself testified in response to a question asked by his counsel:

"Well, I would answer that by saying the St. Louis Terminal Association up to that point (meaning the time of the delivery of the way-bill) would not have recognized any order the consignee would have made directly to them, *and we would not have attempted to make a movement*, without the consignee, who would order through our agent in East St. Louis."

In view of such testimony and like testimony from his agent Calvert (Rec., 235, 236), and his chief clerk Stapleton (Rec., 205), that this barley while it was standing in cars on these tracks before the delivery of way-bills was held by the Receiver under an arrangement with the consignees, who placed orders with him to hold their barley for further orders, and that these further orders came directly to the Receiver from the consignees, except in occasional instances (Rau Rec., 207, 208) when they got into the hands of Mr. Roeder, a joint agent, who always turned them over to the Receiver's agent, how can it reasonably be contended that this barley was at the time

it was destroyed in the possession of the Terminal Association, or was held by it under some arrangement made with the consignees for holding their barley on its tracks. Especially when there had been no delivery of it to that Association, either actual or constructive, and when that Association could not know and did not know what the cars contained until they were delivered to it in the usual manner by delivering the customary way-bill. For, does not the testimony indisputably show that after the cars were placed on these tracks, and up to the time way-bills therefor were delivered to the Terminal Association, the Receiver held them on orders placed with his agent by the consignees to hold their barley for further orders.

Stated most favorably to the Receiver, the testimony which he in fact introduced in evidence, and the testimony which he stated he *expected* to introduce in evidence, proves, or tends to prove, that the consignees had an arrangement with both the Receiver and the Terminal Association for holding barley at East St. Louis. This testimony, if reconciled as it should be, can all be given effect, for it shows that the arrangement which the consignees had with the Receiver for holding their barley was intended to apply while it was standing on the tracks which the Receiver used between the time of its arrival at East St. Louis and the time when it was way-billed over to the Terminal Association; and that the arrangement they had with the Terminal Association to hold cars on "*their tracks*," and for other facilities in "*their yards*" applied to the cars of barley after they had come into the possession of that association in the usual and customary way, by the delivery of way-bills, and had been switched into "*their yard*" and were on "*their tracks;*" *or* to cars which the Receiver could not hold on his tracks by

reason of the limited space which he had contracted for being fully occupied by other of the Receiver's cars. For the Receiver had storage room for only 150 cars at a time, and it may well be presumed that at times he did not have sufficient space to store all the cars which the consignee desired held at East St. Louis under their arrangement with the Receiver, and they, therefore, made an arrangement with the Terminal Association to store such cars as the Receiver had not room for. Your Honors can very well see what is liable to confront these barley shippers if they shall be driven to sue the Terminal Association.

It is more reasonable, and certainly more in accord with the rules of evidence, to harmonize this testimony—all coming from the Receiver's witnesses—in this manner, than it is to eliminate from the case the testimony of Stapleton, Calvert and the Receiver himself, as would have to be done if the construction given by the presiding Judge to the testimony that Receiver's counsel stated he had expected to introduce, is adhered to. Unless this testimony can be reconciled, as we think it can and should be, then it is in serious conflict, and the conclusion necessarily follows that the burden of proof which was upon the Receiver to show by clear and satisfactory evidence that he had made a delivery of these cars and their contents before the loss occurred, has not been met. For the testimony of his witness Stapleton, that barley arriving at East St. Louis was held there by the Receiver up to the time it was way-billed out under "*a new arrangement by the consignee, who placed orders with us (the receiver) to hold his barley,*" as well as the testimony of Calvert and the Receiver, is absolutely inconsistent with the theory or claim that there had been a delivery of the

barley and cars in controversy to the Terminal Association.

While on the other hand, if the arrangement which counsel for Receiver expected to prove by certain witnesses, that the Terminal Association had agreed to hold cars of barley for the consignee in *its yards* at East St. Louis, is given the construction which is placed upon it by Circuit Judge Jenkins in his opinion, viz: that this arrangement was only intended to apply to cars loaded with barley, after there had been a delivery in accordance with the usual method of making deliveries of barley by the Receiver to the Terminal Association, and as explained by Felps (Rau Rec., 82, 86), so that the cars were, quoting from counsel's statement, "*on their tracks*," it is then not only consistent with the arrangement under which the Receiver and his witnesses, Calvert and Stapleton, say the barley was held between the time of its arrival and the delivery of way-bills therefor to the Terminal Association, but is consistent with the custom which all the testimony shows prevailed at East St. Louis, that as between the Receiver and the Terminal Association a car was never treated as delivered until the Receiver had delivered to the Terminal Association the customary way-bill, containing the name of the consignor, consignee, destination, route, number and contents of the car. And a way-bill was never delivered to that Association by the Receiver for any car loaded with barley until the consignee notified the Receiver to do so. And further, until the way-bill for a car had been delivered, and not before, did the Receiver notify the company whose car he had so delivered, had been delivered. This is significant. For it shows in whose possession the car was up to the time that the way-bill therefor was delivered.

This interpretation of the testimony is likewise consistent with the construction which, we contend, should be given the contract under which the Receiver used the tracks of the Terminal Association, viz: that while his cars were standing upon the tracks which he contracted and paid for the use of, they were in his possession as much so as if he had owned the tracks absolutely.

And further, such interpretation is consistent with the stipulation of the parties, that the cars in controversy at the time of the fire were standing on the tracks which the Receiver had the use of under his agreement with the Terminal Association. (Rau Rec., 115.) This fact is likewise significant, for it shows conclusively that the very cars in controversy were in the Receiver's possession at the time of the fire, for they were at that time, and had been, ever since their arrival at East St. Louis, standing on the tracks which the Receiver had the use of under his agreement. This agreement took the place of ownership, and possession under it was the same as possession with ownership.

We therefore most respectfully but earnestly request this court to order these cases to be certified to this court for final determination. We feel that a wrong conclusion has been reached, that a wrong construction has been given to the statement of counsel for Receiver as to what he expected to prove by certain witnesses—a construction that was not intended by the parties, a construction that petitioners should not be bound by in view of the testimony of witnesses for the Receiver, that the consignees had arranged with the Receiver to hold their barley upon its arrival at East St. Louis until further orders, and of the stipulation of the parties that the particular cars in controversy were at the time of the fire standing on

the tracks which the Receiver had the use of under his agreement with the Terminal Assciation, a construction which raises a serious conflict between the testimony which counsel stated he expected to introduce, and the testimony of Stapleton, Calvert and Bosworth, which he did introduce in evidence, a construction which is far beyond that which petitioners' counsel ought reasonably to have expected in view of the testimony, which Receiver's counsel had introduced prior to the making of that statement, in reference to the arrangement which the consignees had with the Receiver for holding this barley, and the custom which all the testimony shows prevailed at East St. Louis, that a car loaded with barley, while standing on the Receiver's tracks, was never treated by the Receiver as delivered to the Terminal Association until his agent had delivered a way-bill for the car, taken the usual receipt therefor and the car switched from his portion of the yard. We feel also that Circuit Judges Woods and Showalter, in the consideration of these cases, have overlooked the well established rule of law, that when possession of property is once proven to be in a carrier, the presumption is that such possession continues until it is shown to be elsewhere: and that the burden is upon the carrier to show by a preponderance of proof—proof that is clear and satisfactory, not conflicting or as consistent with non-delivery as with delivery—that there has been a delivery of the possession either to the consignee or the succeeding carrier, whichever the case may be. This proof, we submit, is not present in these cases. For if the construction which we are contending for is not to be given to the statement of counsel, then it is at war with the testimony of his other witnesses Stapleton, Calvert and Bosworth, as well as with

nearly all the other testimony in the case which relates to the holding and delivery of cars loaded with barley at East St. Louis. A carrier upon whom the burden of proof rests to show delivery of property to a connecting carrier, especially in a suit by the owner to recover its value in case of loss, cannot and ought not to discharge that burden by testimony that is conflicting or is susceptible of two or more constructions, or is as consistent with non-delivery as with delivery. Such is the case here—if the construstion which the presiding Judge has given to counsel's statement is to prevail.

3. It is assumed by the presiding Judge that the Receiver's agents at East St. Louis had sent to the consignees the usual notice of the arrival of the cars of barley in question. There is no proof to sustain this presumption, and the master found that no notice had been sent by the Receiver's agent to the consignee. (Rau Rec., 67.) But conceding this to be true, then the other presumption inevitably follows, that such notice was sent in pursuance of the arrangement which Stapleton testified was "*a new arrangement by the consignee who placed orders with us to hold his barley.*" (Rau Rec., 205.) This leaves no room for the contention that this particular barley at the time it was destroyed was being held by the Terminal Association under an arrangement with the consignee. For the fact that the Receiver's agent sent notices to the consignees that he had certain cars loaded with barley consigned to them, giving the number of the cars in controversy, asking them where they wanted them sent, and that this was done in pursuance of an arrangement between him and the consignees to hold their barley on their orders, placed with him, shows conclusively that the particular barley in question at the time it was de-

stroyed was being held by the Receiver under his arrangement with the consignees to hold it, and not by the Terminal Association under is arrangement with the consignees. The presumption that the customary notices covering the particular cars of barley in controversy were sent by the Receiver's agent to the consignees, and that such notices were sent in pursuance of "*a new arrangement the consignee directed and controlled*"—"*a new arrangement by the consignee, who placed orders with us* (the Receiver) *to hold his barley*" (Rau Rec., 205), precludes the claim that the barley in question was being held under any other arrangement than that testified to by the Receiver's witnesses.

We, therefore, respectfully submit that a wrong construction has been given the statement of counsel for Receiver, and a value attached to it that is not warranted by the testimony, which the Receiver himself introduced. Either this is true, or the testimony which counsel expected to introduce is wholly inconsistent with the testimony which he did in fact introduce, in which event we contend that the burden of proof which was cast upon the Receiver was not met, and for that reason the conclusions of Circuit Judges Woods and Showalter are erroneous.

III.

CLAIM FOR CARS DESTROYED.

This claim rests on somewhat different grounds than do the claims for barley destroyed. Commercial necessities require that cars engaged in the freight carrying business of the country shall be exchanged between the various railway companies. This gives rise to a

system of car bookkeeping between the companies, and the necessity for the rule, which all companies recognize and act under, that each company, upon making a delivery of a car, not its own, to a connecting line shall report such delivery to the company owning the car, giving the number of the car, date of delivery and the company to which it has been delivered, and that until such delivery is so reported the car shall stand charged to the company last reported as having received it; and if destroyed while on the tracks of that company, such company shall be liable therefor the same as it would be for any other property which it might have in its possession for transportation or delivery.

That this system of car bookkeeping and rule of liability prevailed between the Receiver's company and the Chicago, Milwaukee and St. Paul Railway Company, there is no question under the testimony. Calvert, the Receiver's agent at East St. Louis, and Bradley, his car accountant, testified, as did Beecham, the car accountant of the St. Paul Company, to this system. (Rau Rec., 97, 99, 104, 101, 154.) The rule of liability for damaged or destroyed cars was testified to by both Mr. Beecham and Bosworth, the Receiver.

Mr. Beecham:

Q. Are you acquainted with the practice and custom which prevailed among the different railroads of the United States in respect to the settlement or payment for cars damaged or destroyed when in possession of companies not owning the cars?

A. Yes, sir.

Q. You may state what the practice or custom is.

A. The practice is for the company, through its master car-builder, for the companies on whose track the car is destroyed, to report such destruction to the owner of the car and to call for a history of the car, showing when

it was built, and then they deduct a depreciation and salvage and settle direct with the owners of the car if they so elect, but they may—it is optional with them to rebuild the car.

Q. So the company in whose possession the foreign car is, in case that car is damaged or destroyed, either rebuilds the car or pays the company owning it?

A. That is the universal practice.

Q. Is that the way all settlements are made between different companies with respect to damaged and destroyed cars?

A. Yes, sir; it is.

Q. So that a car of the Chicago, Milwaukee and St. Paul Railway Company, while in possession of the Chicago, Peoria and St. Louis Railway Company, if damage or destroyed, the latter company would pay the St. Paul Company for it or rebuild the car?

A. Yes, sir.

Q, You say that is the custom and practice on which all settlements are made between the different companies?

A. Uuiform practice and custom. (Rau Rec., 142.)

Mr. Bosworth:

Q. It is a custom between all railroads, if a car of the St Paul Railway is destroyed on your track, that you pay for it?

A. Yes, sir.

Q. And that is on the ground that you have possession of the car, and in accounting for the loss of it you account to the owner and pay for it; that is a well understood custom, isn't it?

A. Yes, sir.

In this connection, it should be stated that in pursuance of the custom which Mr. Beecham and Mr. Bosworth testified to, Mr. Bradley, the Receiver's car accountant, reported to Mr. Beecham under date of November 2, 1894, four days after the fire, the cars which had been destroyed by the fire belonging to the St. Paul Company. (Rau Rec., 129, 130.) This is significant, for it shows that the car accountant regarded these cars as in the possession of

the Receiver at the time they were destroyed and accordingly reported their loss to the car accountant of the St. Paul Company.

There is likewise no dispute in the testimony concerning the possession of the particular cars in controversy. At the commencement of the taking of testimony it was formally agreed between the parties, by written stipulation signed and filed, that the thirty-eight cars in controversy were at the time of the fire standing on the tracks which the Receiver commonly used under his agreement with the Terminal Association. (Rau Rec., 115.) This puts at rest all questions concerning the actual possession of these cars. It should also be borne in mind that they were not standing on these tracks for unloading there, but were awaiting orders for their further movement; the case, therefore, is not one where cars have been set on a private side-track of the consignee for unloading, in which event it might well be said they were not in the carrier's possession; but here they were in the Receiver's possession, on his tracks, awaiting further transportation. Besides this, it was an invariable rule for the Receiver to deliver to the Terminal Association a way-bill for every car delivered to that Association. No way-bill had been passed for any of the cars in controversy; no junction report had been sent to or received by the St. Paul Company for any of the cars. (Rau Rec., 100.) They all stood charged on the books of that company as being in the possession of the Receiver's company.

Mr. Beecham testified:

Q. In whose possession were these cars I have spoken of—these thirty-eight cars—who were they charged to?

A. Chicago, Peoria and St. Louis Railroad. (Rau Rec., 103.)

The case, therefore, comes to this: That as between the Receiver's company and the St. Paul company, these cars were in the possession of the former company, and under the custom which had been established by long continued practice between the companies, it is liable for their value. If custom is to be considered in determining the liability for the contents of the cars, it should likewise be considered in respect to the cars themselves. And we submit that the testimony indisputably shows that the Receiver's company was a party to a custom or practice that fastens upon it a liability for these cars, and that it cannot evade that liability by showing that the consignees of the barley had arrangements with the Terminal Association for holding cars or giving them other facilities in its yards. Whether the Receiver's company knew of this arrangement is immaterial, so far as the rights of the St. Paul company are involved. It did know that these cars were on tracks which it had the use of, and that they were charged to it as being in its possession on the books of the St. Paul company. It, therefore, knew that under the rules and custom governing the exchange of cars between the various railway companies, that its liability for these cars would continue until it had made a delivery of them in the usual way that deliveries of cars were made at that place and such delivery reported to the St. Paul company. Such delivery not having been made or reported and the cars at the time of the fire being on tracks which the Receiver's company used under its agreement with the Terminal Association to give it facilities for handling and storing cars, it conclusively follows that the liability for these cars is with that company and not with the Terminal Association.

So far as the courts have had occasion to consider this

question, they have held that a railway company is liable for the safe carriage and return of cars belonging to other companies which come into its possession in the usual course of business, the same as it is for any other property which it handles as a carrier or as a warehouseman. So long as cars of one company are in the possession of another company, that company is accountable for them as a carrier or as a warehouseman. If they have been set on a private delivery track belonging to the consignee, for loading or unloading, then they are not in the possession of the carrier, and consequently its liability is interrupted during the time they are so out of its possession (*Railway Co.* v. *Ry. Co.*, 123 Ill., 594); but if they are placed on the carrier's tracks for loading and unloading, the rule is different, and they will be regarded as in the possession of the carrier, its liability being that of a warehouseman only. (*Ry. Co.* v. *Rolling Stock Co.*, 136 Ill., 644.) We, therefore, come back to the question: Were these cars, as between the Receiver's company and the St. Paul company, in the possession of the former company at the time they were destroyed? If they were, then it is liable therefor, both under the rule of liability, which a long-continued practice and custom had created, and the decisions of the courts. We submit that, under the second subdivision of the stipulation of August 27, 1895 (Rau Rec., 115), and the rules and custom which prevailed between the two companies, under which deliveries of cars were made and reported and the accounts thereof kept, there can be no doubt as to where the possession of these cars was at the time they were destroyed, or of the Receiver's liability.

The following cases bear upon this question:

Ry. Co. v. *Ry. Co.*, 109 Ill., 135.

Ry. Co. v. *Ry. Co.*, 123 Ill., 594.
R. R. Co. v. *R. R. Co.*, 14 Allen, 462.
Ry. Co. v. *Rolling Stock Co.*, 136 Ill., 649.
Malory v. *Ry. Co.*, 39 Barb., 488.

IV.

In conclusion, it can but be said that this case could not be better stated in all its phases than is done in the dissenting opinion by Circuit Judge Jenkins, and it is urged upon this court to carefully examine and consider that opinion. It is in harmony with the case as presented by the record, it is in harmony with the succinct and able report of the Master and the decrees entered thereon by Judge Allen at the Circuit, it is in harmony with the decisions of this and other courts, it is in harmony with the manifest justice of the case. The opinions of Circuit Judges Woods and Showalter are not only opposed to each other, but they are inconsistent with the decisions of this Honorable Court, especially in the cases of *Pratt* v. *Ry. Co.*, 95 U.S., 43, and the Covington Stockyard case, 139 U. S., 128, and the decision of the United States Circuit Court of Appeals for the Second Circuit in *Texas & Pacific Ry. Co.* v. *Clayton*, 51 U. S. App. 676, and with the decisions of the state courts as announced in *Mount Vernon Co.* v. *Ala. G. S. Ry. Co.*, 92 Ala., 296, 298; *Palmer* v. *C. B. & Q. Ry. Co.*,13 Atl. Rep., 818; *Ins. Co.* v. *Ry. Co.*, 55 Tenn. Repts., 268. They are not therefore entitled to any strong presumption of correctness. They leave the question of law involved in a state of grave and serious uncertainty, and the petitioners in the predicament that one Bromley was left, after a litiga-

tion lasting several years over the loss of his portmanteau —he had neither portmanteau nor a right of action against either carrier for its recovery. *Midland Ry. Co.* v. *Bromley*, 8 J. Scott, 372 (84 E. C. L. 372, 382, note a).

To prevent the uncertainty in the law that will be occasioned if the decisions rendered by Judges Woods and Showalter are allowed to stand, this court is respectfully urged to grant writs of certiorari, requiring these cases to be sent here for review and final determination.

All of which is respectfully submitted.

GEORGE R. PECK,
BURTON HANSON,
Counsel for Petitioners.

Explainatory Note:

Refererence is made to the record in the Rau case only, for the reason that the record in the cases of the Chicago, Milwaukee and St. Paul Railway Company and the Hunting Elevator Company are the same as in the Rau case.

No. 12.

For other Briefs Herein
See Preceding case.